(10)

No. 06-173

IN THE

Supreme Court of the United States

SAN CARLOS APACHE TRIBE,

Petitioner,

v.

STATE OF ARIZONA; GILA RIVER INDIAN COMMUNITY; ASARCO LLC; PHELPS DODGE INCORPORATED; SAN CARLOS IRRIGATION AND DRAINAGE DISTRICT; CITY OF SAFFORD; GILA VALLEY IRRIGATION DISTRICT; FRANKLIN IRRIGATION DISTRICT; SALT RIVER PROJECT; CITY OF GOODYEAR; BHP COPPER INCORPORATED, AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

REPLY BRIEF OF PETITIONER TO THE UNITED STATES

JOE P. SPARKS
Counsel of Record
SUSAN B. MONTGOMERY
ROBYN L. INTERPRETER
SPARKS, TEHAN & RYLEY, P.C.
7503 First Street
Scottsdale, AZ 85251
(480) 949-1339

Attorneys for Petitioner San Carlos Apache Tribe

205521

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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PETITIONER'S REPLY BRIEF TO THE UNITED STATES

Pursuant to Rule 16.6 of the Rules of the Supreme Court of the United States, Petitioner, San Carlos Apache Tribe ("Apache Tribe" or "Tribe"), submits this Reply to the United States' Brief in Opposition to the Tribe's Petition for Writ of Certiorari to the Arizona Supreme Court.[1]

A. The United States Agrees with Petitioner that this Court has Jurisdiction under 28 U.S.C. § 1257(a)

Citing *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 480 (1975), the United States agrees with the Petitioner that the decision below constitutes a "final judgment" for purposes of this Court's jurisdiction under 28 U.S.C. § 1257(a):

> [T]his Court has jurisdiction to consider the petition under 28 U.S.C. § 1257(a) .... Moreover, a general stream adjudication is a paradigmatic case for application of the *Cox Broadcasting* rule quoted above ... This case has been pending for over two decades. It would make little sense for this Court to defer review of one claim or issue until all others are resolved, potentially several decades later. That course could prejudice *all* parties to the adjudication if this Court ultimately upset decades of litigation by overturning an initial determination.[2]

The most tragic of consequences is the continued deprivation of the waters of the Gila River mainstream for use by the Apache Tribe. Water and prosperity are inseparable in Arizona. To overcome the unequaled poverty on the San Carlos Apache Reservation ("Reservation"), the Apache Tribe must have sufficient water to fulfill the purposes of the Reservation as a permanent Tribal homeland. As the United States correctly

1. Simultaneous with this Reply, the Apache Tribe is filing (1) a Reply to the Response in Opposition filed by ASARCO, LLC; and (2) a Consolidated Reply to the Responses in Opposition filed by Phelps Dodge Corporation, the City of Safford, and the Gila Valley Irrigation District.

2. Brief of the United States in Opposition ("U.S. Resp.") at 9-10 (internal citations omitted) (italics in original).

observed, Arizona's stream adjudication has already been pending for over two decades. This delay violates, *inter alia*, the fundamental due process rights of the Tribe, because it leaves the Tribe unable to protect and use its prior perfected federally reserved, aboriginal and other water rights to the mainstream of the Gila River in order to achieve even the most basic standards of living for its people.

B. The Petition Raises Issues Of Broad Legal Significance for Indian Tribes and for the United States In its Role as Trustee for the Tribes

While respondent United States agrees that the Arizona Supreme Court erred when it refused to consider the Apache Tribe's defense to the affirmative defense of *res judicata* based upon general principles of "comity", it nevertheless urges that the Petition does not raise matters of sufficient magnitude or precedential value to warrant this Court's review.[3] The Apache Tribe respectfully disagrees, as explained below.

1. Constitutional Protections of Due Process Mandate that Indian Tribes Be Permitted to Defend Themselves Where the Affirmative Defense of *Res Judicata* is Converted Into a "Sword" To Attack Indian Tribes' Water Rights

At its very core, the Apache Tribe's Petition rests on fundamental principles of Constitutional due process, and presents the question of whether Indian tribes are **ever** entitled to challenge the adequacy of the United States' representation, and thereby the existence of "privity" between the United States and the tribe, when confronted, in a subsequent proceeding, with the an attempt to use *res judicata* as a "sword" to eviscerate tribal property rights.

In what can only be seen as a frightening disregard of due process, the Arizona Supreme Court concluded that general principles of "comity" acted as a complete bar to any consideration of the Tribe's defense to the affirmative defense of *res judicata* raised by the Tribe's opponents in Arizona's

3. *See* U.S. Resp. at 8-16.

stream adjudication. Having refused to consider the Tribe's defense, the Arizona Supreme Court went on to rule in favor of the Tribe's opponents, holding that the United States and the Tribe were precluded by *res judicata* from asserting for the Apache Reservation any federal reserved, aboriginal, or other water rights claims to the mainstream of the Gila River, other than the nominal water rights prescribed for the Reservation in the 1935 federal consent decree known as the "*Globe Equity No. 59 Decree*" ("*Decree*").[4]

This decision leaves opponents of Indian tribes free to brandish *res judicata* as a sword to preclude proof of Indian property rights, while the tribes can say nothing in defense of their rights. In application, *res judicata* used in this manner is the functional equivalent of Arizona's historic law which, well after the entry of the *Globe Equity Decree* in 1935, prevented Indians in Arizona from testifying in court. This Court should not countenance a similar violation of due process and equal protection here.

While respondent United States insists on the one hand that the ruling of the Arizona Supreme Court presents only narrow issues, constrained to the purportedly "unique" circumstances of Arizona's stream adjudication, on the other hand, respondent candidly acknowledges the broader implications of the decision below:

> There is a serious question whether that theory [of inadequate representation] could ever apply where, as here, the United States as sovereign settled a claim for

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4. Respondent incorrectly explains that "Petitioner does not challenge the Arizona Supreme Court's ruling that the Globe Equity Decree adjudicated petitioner's rights to water from the Gila River mainstem." To the contrary, the Apache Tribe has directly challenged this ruling in its Petition, contending, *inter alia*, that the *Decree* could not have "adjudicated" the Apache Tribe's claims for federal reserved, aboriginal or other water rights to the mainstream of the Gila River because the Tribe was not party to the *Decree*, and given the United States' grossly inadequate representation of the Tribe in *Globe Equity*, the Tribe cannot be viewed as being in "privity" with the United States for purposes of *res judicata*.

> Indian water rights. Even in circumstances where reliance on a *private party's* inadequate representation would be unjustifiable, reliance on the *United States'* sovereign actions presents a different question.[5]

This, of course, goes to the very heart of the Apache Tribe's Petition.[6] Indian tribes have long been represented in legal proceedings involving their water rights, timber resources, mineral interests and other natural resources by the United States. *See Heckman v. United States*, 224 U.S. 413 (1912). Can it really be true, as the respondent United States suggests, that in these instances, tribes (unlike "private parties") are simply **never** entitled to the due process right in a subsequent action to challenge the existence of "privity" between the United States and the tribes, whether under principles of equity or pursuant to the theory of "inadequate representation" provided in *Restatement (Second) Judgments*, § 42(1)(e)?

This is a dangerous suggestion, as it would place government alienation of Indian property and resources beyond limit.[7] A simple government employee could act to deprive Indian tribes of due process, if the existence of privity between the United States and Indian tribes is assumed. This would include instances where the United States' representation of a tribe was grossly inadequate or incompetent, corrupt, or even punitive, including where the United States or its employee or representative deliberately compromised away or otherwise resolved a legal proceeding in such as manner as to leave the tribe with little or no right to certain natural resources on its reservation, or (as in the instant proceeding) without any meaningful federal reserved, aboriginal or other water rights to the most significant source of water on the tribe's reservation.

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5. *See* U.S. Resp. at 15 (italics in original).

6. *See* Issue II of the Tribe's Petition for Certiorari.

7. The alienation of Indian property has, until now, been within the plenary and exclusive power of Congress. *See, e.g., United States v. Dion*, 476 U.S. 734, 738 (1986).

In these instances, where the United States forsakes its role as trustee in favor of its own interests or the interests of others, and wholly fails to "adequately represent" its Indian "wards" in a prior proceeding, bedrock principles of due process must prevent the application of *res judicata* to the same extent due process would protect similarly situated non-Indians.[8]

Indeed, if there ever was a case in which this reasoning should be applied with full force, **that case is now before the Court**, as witnessed by the United States representation of the San Carlos Apache Tribe in *Globe Equity*.[9] The Tribe respectfully urges the Court to grant its Petition and make clear that the Constitution does not countenance the use of "comity" or general

8. Respondent is also incorrect to insist that the Apache Tribe has not contended in its Petition ". . . that the decision below is in conflict with any other decision of this Court or another appellant court." U.S. Resp. at 13. As the Apache Tribe made clear in its Petition, the ruling below conflicts with well settled principles of due process expressed by this Court in numerous rulings, including the case of *Hansberry v. Lee*, wherein this Court discussed the rule that *res judicata* generally extends no further than to the parties of the prior litigation. *See Hansberry v. Lee*, 311 U.S. 32, 40 (1940). It is axiomatic that this rule stems from the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution. *See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971); *Postal Telegraph Cable Co. v. City of Newport*, 247, U.S. 464, 476 (1918). Thus, this Court concluded in *Hansberry v. Lee*, that it violates fundamental protections of due process to bind litigants to a judgment rendered in an earlier litigation to which they were not parties, and in which they were not **adequately** represented. *See* 311 U.S. at 37.

9. In this respect, respondent's argument that the precedential significance of the Arizona Supreme Court's ruling is "limited" and unlikely to "recur frequently" is simply wrong. *See* U.S. Resp. at 8. The Court should correct here the notion that Indian tribes (unlike non-Indians) can be deprived of due process protections where the affirmative defense of *res judicata* is asserted against a tribe in a subsequent action, based upon the United States purported representation of its "wards" in an earlier proceeding. As explained more fully in the Tribe's Petition, such a wrongheaded application of general principles of *res judicata* would also deprive the Apaches of equal protection under the law.

principles of *res judicata* to trump fundamental protections of due process.

2. The Arizona Supreme Court's Application of Comity Directly Conflicts With This Court's Decisions in *Arizona v. San Carlos* and *Colorado River Water Conservation Dist. v. United States*

Respondent also contends that the Petition does not warrant this Court's review because the rulings of the Arizona Supreme Court below do not conflict with this Court's decision in *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). Respondent is wrong.

In *Arizona v. San Carlos*, this Court, applying the rule of *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 811 (1976),[10] required the United States as trustee for Arizona Indian tribes, including the Apache Tribe, to adjudicate its water rights claims in Arizona's stream adjudication, and advised that Arizona Indian tribes would be wise to intervene in the State adjudication to protect their interests. This ruling was founded upon the Court's grave concern that allowing the adjudication of Indian water rights in a **federal** forum would almost certainly result in "piecemeal litigation" which was likely to be:

> [D]uplicative and wasteful, generating 'additional litigation through permitting inconsistent dispositions of property' and that since a judgment by either court would ordinarily be res judicata in the other, the existence of such concurrent proceedings creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the same issue first – a race contrary to the entire spirit of the McCarran Amendment and prejudicial, to say the least, to the possibility of reasoned decision making by either forum.[11]

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10. *See also United States v. District Court for Eagle County*, 401 U.S. 520 (1971).

11. *Id.* at 567 (quoting *Colorado River*, 424 U.S. at 819) (internal citations omitted).

This Court also admonished, however, that Arizona had a "solemn obligation to follow federal law" in adjudicating the Tribe's water rights, and promised that ". . . any state court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment." *Id.* at 571. Based upon this Court's decision in *Arizona v. San Carlos*, on November 1, 1985, the United States and the Apache Tribe each filed claims for federal reserved, aboriginal, and other water rights in Arizona's stream adjudication to, *inter alia*, the Gila River mainstream, in conformance with the deadline set by the State Adjudication Court for the filing of such claims.

The decision below on "comity" directly violates this Court's ruling in *Arizona v. San Carlos* (and *Colorado River*) as it sends the Tribe back to federal court to obtain a federal decision on the question of whether or not the Tribe has additional rights to the Gila River mainstream, other than those prescribed for the United States in the *Globe Equity Decree*, thereby occasioning the very "piecemeal litigation" of Indian claims rejected by this Court in *Arizona v. San Carlos* under the McCarran Amendment, 43 U.S.C. § 666.[12] Interestingly, respondent appears to agree with this point,

12. The Arizona Supreme Court not only concluded that "comity" compelled the Tribe to return to the federal *Globe Equity Court* to raise its defense to the affirmative defense of *res judicata* (though the affirmative defense was first raised in Arizona's stream adjudication), it went on to speculate that **if** the Tribe were to present its defense to the *Globe Equity Court*, the *Globe Equity Court* would have denied the defense as untimely (App. 46a), and therefore, in deference to this perceived ruling (which never happened), the Arizona Supreme Court went on to assume the existence of privity between the United States and the Tribe in *Globe Equity*, and thus to conclude that *res judicata* precluded the United States and the Tribe from making any water rights claims to the mainstream of the Gila River in Arizona's stream adjudication, other than the annual irrigation right to 6,000 acre feet of water for 1,000 acres of land. *Id.*

at least in part, where it reasons:

> As part of that adjudication, the Arizona courts could properly resolve the question whether petitioner has a valid federal-law ground for overcoming the res judicata defense raised by other parties in this general stream adjudication. It makes little sense for the state courts to decline to consider an issue of federal law out of comity to the federal courts when the federal courts have already abstained in deference to the state courts – especially when this Court has so directed and emphasized the state courts' obligation to follow federal law.[13]

In this regard, respondent is at least partially correct. However, it not only makes "little sense" for state courts to decline on comity grounds to consider the Apache Tribe's defense to the affirmative defense of *res judicata* (as raised by the Tribe's opponents in Arizona's stream adjudication), it also directly violates this Court's express admonition against piecemeal litigation in *Arizona v. San Carlos*, as well as the due process rights of the Apache Tribe.[14] Arizona cannot undertake to perform a purportedly "comprehensive" adjudication of water

13. U.S. Resp. at 11-12.

14. Moreover, since *res judicata* is an affirmative defense and the burden remains on the party asserting *res judicata* to establish the existence of all three elements of *res judicata* if it is to be applied, requiring tribes to return to the issuing court to challenge the element of "privity", improperly shifts the burden of proof away from the party asserting the affirmative defense of *res judicata*. Furthermore, it is unclear under what standard a tribe would challenge the adequacy of the United States' representation (and thus the existence of privity) in the originating court. For example, in federal court, Rule 60(b) of the Federal Rules of Civil Procedure prescribes very different (and considerably more burdensome) legal standards to obtain relief from a judgment. Thus, a tribe seeking relief under Rule 60(b) due to the inadequate representation of the United States in the original action, would have to prove by "clear and convincing evidence" that a "fraud on the court" had been committed in the earlier action, and not simply that the element of privity between the tribe and the United States had not been proven by the party asserting *res judicata* as an affirmative defense.

rights in Arizona, which includes the federal reserved, aboriginal and other water rights claims made by and for Indian tribes, and then rely on general principles of "comity" (the virtual antithesis of this Court's ruling in *Arizona v. San Carlos*) to require Indian tribes to return to the originating court to litigate and determine **their defenses** to *res judicata*, when *res judicata* is asserted in the State adjudication as a potential bar to their water rights claims.

C. Whether the Apache Tribe Would Prevail as a Factual Matter In its Challenge to the Adequacy of the United States' Representation of the Tribe in *Globe Equity* Has Never Been Considered By Any Court In a Trial On the Merits

Relying on quotes taken from a handful of documents selected from the many thousands of pages of reports, letters, memoranda, government materials and other historical documents on the history of the Apache Tribe, respondent urges "as a factual matter" that there is a "substantial question" whether the Tribe would prevail, even if this Court were to reverse the Arizona Supreme Court's decision on comity.[15] Respondent is wrong for several reasons.

First, as discussed in the Tribe's Response in Opposition to the Conditional Cross-Petition filed by Phelps Dodge,[16] the Tribe has never been given an opportunity to prove in a trial on the merits the facts giving rise to its defense against *res judicata*. If it had, it would have proven that the United States so grossly and inadequately represented the Tribe in *Globe Equity*, as to destroy any vestige of privity between the United States and the Tribe, and to provide clear notice to the opposing parties of this fact, creating no legitimate claim of justifiable reliance by them *vis-a-vis* the water rights claims for the Apache Tribe.[17] Respondent's recitation of select "facts" here simply repeats

15. U.S. Resp. at 15-16.

16. *See* Apache Tribe's Response In Opposition to Phelps Dodge's Condition Cross-Petition at 10-13.

17. The United States previously agreed in its Opening Brief before (Cont'd)

many of the facts disputed by the Tribe below – "facts" which are outweighed by the weight of historical documents and which have not been proven in a trial on the merits.

Moreover, the grossly inadequate conduct of the Secretary need not be proven by resort to historical documents (though it can be), because it is apparent on the face of the *Decree*. For 1,500,000 acres of Reservation lands in the Gila River drainage, the United States pressed for and secured a mere fraction of the water rights to which the Tribe was entitled under *Winters v. United States*, 207 U.S. 564, 565 (1908), and then included a provision in the *Globe Equity Decree* for the **sale** of this remaining right to non-Indian farmers in the Upper Valleys for the benefit of SCIP,[18] which would have left the Tribe without a single drop of water from the Gila River mainstream. Respondent is simply wrong to asserts that the Tribe is unlikely to prevail if given an opportunity to prove its defense to the application of *res judicata*.[19] This Court has promised to review "with particularized and exacting scrutiny" any state court decision alleged to abridge Indian water rights protected by federal law. *See Arizona v. San Carlos*, 463 U.S. at 561. It should do so here.

CONCLUSION

The San Carlos Apache Tribe respectfully requests that this Court grant its Petition and issue a writ of certiorari as to Issue 1 and Issue 2 to the Arizona Supreme Court on the decision below.

(Cont'd)

the Arizona Supreme Court that the Tribe is entitled to a trial on the merits regarding its inadequate representation defense. *See* U.S.-Opening-Resp. at 81.

18. *See* Article VI(2), *Decree*, Apache Tribe Supplemental Appendix to Petition for Certiorari, No. 06-173 ("Supp. App") at 198.

19. Respondent also briefly argues that this Court's rulings in *Nevada v. United States*, 463 U.S. 110 (1983) and/or *Arizona v. California*, 460 U.S. 626 (1983) might apply to preclude Petitioner's defense of inadequate representation as a matter of law. However, both of these cases are factually and legally distinguishable from this case. Because this point is more fully addressed in the Apache Tribe's Consolidated Reply to the Responses in Opposition filed by Phelps Dodge Corporation, the City of Safford, and the Gila Valley Irrigation District, the Tribe does not duplicate its argument on the topic here.

Respectfully submitted,

JOE P. SPARKS
Counsel of Record
SUSAN B. MONTGOMERY
ROBYN L. INTERPRETER
SPARKS, TEHAN & RYLEY, P.C.
7503 First Street
Scottsdale, AZ 85251
(480) 949-1339

Attorneys for Petitioner
San Carlos Apache Tribe